

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROYALE LAMPTON IRVIN,

Defendant-Appellant.

UNPUBLISHED

November 21, 2013

No. 306188

Wayne Circuit Court

LC No. 11-002412-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to consecutive prison terms of 35 to 70 years for the second-degree murder conviction and five years for the felony firearm conviction. He appeals as of right. We affirm.

The evidence at trial showed that defendant went to the home of Karen Thomas (“Tee Tee”) at 3:00 a.m. and knocked on the door. When Derek Kirkland, her boyfriend, answered the door, defendant asked whether Tee Tee was home and then shot Kirkland five times through the door. Several witnesses testified that, after the shooting, defendant claimed that he did not “do drivebys,” he did “knock knocks.” Two other individuals were charged. One of them drove with defendant to Thomas’ home and the other obtained the address of the home and information that Thomas, the intended victim, was home at that time. Both of these individuals were allowed to plead to lesser charges in exchange for their testimony. Defendant testified that he went to the home to confront “Tee Tee,” who he believed had participated in a rape of his sister two years earlier. Defendant claimed that he acted in self-defense and that, when he knocked on the door, Kirkland opened the door with a gun in his hands.

I. INADMISSIBLE EVIDENCE

Defendant first argues that text messages supposedly sent by Karen Thomas were inadmissible hearsay. MRE 801(c). Nonetheless, according to defendant, the prosecution used the texts to show the truth of matters asserted — where and when the murder occurred and the motives of defendant and his codefendants. Defendant also argues on appeal that the text messages attributed to Thomas, who did not testify, were not authenticated by either her testimony or testimony of a representative of the telephone company that the phone number attributed to Thomas was actually hers. MRE 901(a).

This Court reviews evidentiary issues for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

The trial court did not abuse its discretion when it allowed the text exchanges to be introduced into evidence. We agree with the prosecution's argument that all of the texts read into testimony at trial were sent or received by the person testifying and were therefore simply cumulative of that witness' testimony. Whether Thomas actually sent or received the messages was not relevant. What mattered was that the witnesses, defendant's codefendants, thought that Thomas sent or received the text messages and that they acted accordingly. The text messages were meant to show the state of mind of the codefendants and their actions based on their beliefs.

We further conclude that the text messages attributed to Thomas were necessary to give the jury an intelligible presentation of the full context in which the disputed events took place. See *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The evidence of the text exchange demonstrated the level of animosity between the codefendants and Thomas. There is no question that the codefendants' state of mind was relevant.

Admission of the text messages also did not violate defendant's right to confrontation. The Confrontation Clause applies only to testimonial statements. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Testimonial statements include testimony given at a preliminary examination, before a grand jury, or at a former trial, as well as statements given during police interrogations. *Id.* at 68. When a statement is not procured with the primary purpose of creating an out-of-court substitute for trial testimony, the admissibility of the statement is governed only by the rules of evidence, not the Confrontation Clause. *Id.*

Further, even if there had been an error in the admission of the text messages, the error would not entitle defendant to a reversal of his convictions. "[A] preserved nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). The burden is on the defendant to demonstrate prejudice. *Id.* at 495. At trial defendant testified that he was the shooter and about his motive. Therefore, defendant failed to demonstrate that, but for the admission of the text messages, the outcome would have been different.

II. SENTENCING GUIDELINES DEPARTURE

Defendant challenges the trial court's decision to upwardly depart from the sentencing guidelines. We review for an abuse of discretion a trial court's conclusion that there was a substantial and compelling reason to depart from the guidelines. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

To justify a departure from the sentencing guidelines, the sentencing court must articulate on the record one or more substantial and compelling reasons for the departure. MCL 769.34(3); *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010). A "substantial and compelling" reason is "an objective and verifiable reason that keenly and irresistibly grabs [the court's] attention" and "is of considerable worth in deciding the length of a sentence." *Babcock*,

469 Mich at 258. “To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008).

In sentencing defendant, the trial court indicated that it had reviewed the presentence report, heard all of the trial testimony, and listened to the statements given at the sentencing hearing. The court stated that it found the case “shocking,” “senseless,” and a case that the court “will always remember.” The court noted that the victim was at his own home, minding his own business, with his family, when he responded to a knock at the door and was murdered. The court also noted that defendant had just been paroled for a felony involving a gun 34 days before the murder, but he acquired another gun, walked up to the victim’s door at 3:00 a.m., and shot him five times in the chest and abdomen, apparently in an attempt to get revenge for an alleged rape of defendant’s sister two years earlier. The court found that defendant displayed a wanton disregard for human life and that attempts at rehabilitating him had been futile. Finally, the court noted that, even given the outrageousness of defendant’s motivation, he killed the wrong person.

The trial court stated facts to justify its departure that were substantial and compelling, objective and verifiable, obviously that keenly and irresistibly grabbed the court’s attention, and were of considerable worth in determining defendant’s sentence. See *Babcock*, 469 Mich at 258. Although the trial court addressed defendant’s lack of remorse — which is not an objective or verifiable factor, *People v Daniel*, 462 Mich 1, 8 n 9, 11; 609 NW2d 557 (2000) — this appeared to be the trial court expressing its abhorrence to defendant’s statement that “we don’t do drivebys, we do knock knocks.” The defendant’s lack of remorse and a court’s opinion regarding the sufficiency of a sentence are not proper reasons to depart from sentencing guidelines. However, even if the trial court relied on these reasons for purposes of its departure from the guidelines, we conclude that the trial court “would have departed to the same degree on the basis of the substantial and compelling reasons alone.” *Babcock*, 469 Mich at 260.

III. DUE PROCESS VIOLATION

Defendant argues that he was denied due process because his counsel was appointed moments before the start of his preliminary examination. Unpreserved issues that concern constitutional rights are reviewed for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

A review of the court record does not support the facts alleged by defendant. Defendant signed a request for court-appointed counsel on February 7, 2011. On February 10, 2011, attorney Cliff Woodards was appointed to represent defendant. The preliminary examination was adjourned so the attorneys could prepare and because defendant’s attorney was out of town. A preliminary examination was held on March 10, 2011, on the charges against defendant and two co-defendants.

Even if defendant’s attorney had been appointed just before the preliminary examination, reversal would be warranted only when the unpreserved error “resulted in the conviction of an actually innocent defendant” or when it “seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* at 763. The evidence presented at the preliminary examination was sufficient to find probable cause to bind

defendant over for trial. At trial, defendant had hired his own attorney who had plenty of time to prepare. The jury was required to use a more difficult standard of proof, beyond a reasonable doubt, and found defendant guilty after hearing all of the evidence. The verdict was supported by sufficient evidence where defendant testified that he was the shooter and there was no evidence that the victim had a gun. Thus, any error that might have occurred at the preliminary examination as the result of defendant's attorney possibly being unprepared was harmless because defendant was convicted after a fair trial. See *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant argues that defense counsel was ineffective because he did not object to instances of prosecutorial misconduct at trial and at sentencing. In order to preserve the issue of ineffective assistance of counsel, a defendant must either make a motion for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). Defendant did not move for a *Ginther* hearing or a new trial in the lower court, and thus, the issue of ineffective assistance of counsel is unpreserved. Where claims of ineffective assistance of counsel have not been preserved, our review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions to decline to object to procedures, evidence, or an argument may fall within sound trial strategy. *Unger*, 278 Mich App at 242, 253. Defense counsel is afforded wide latitude on matters of trial strategy and this Court abstains from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243.

Defendant first argues the prosecutor committed misconduct when she asked defendant if two prosecution witnesses were lying when they testified that defendant claimed that they did not “do drivebys” but did do “knock knocks.” Generally, the prosecutor may not ask a criminal defendant to comment on the credibility of prosecution witnesses. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant, however, handled the question very well, explaining that the witnesses misunderstood what he said. Therefore, defendant suffered no prejudice because his counsel failed to object to the questioning, *id.*, and he was not denied the effective assistance of counsel on this basis.

Next, defendant argues that the prosecutor engaged in misconduct in rebuttal closing arguments by stating, “That’s why this is the worse city in the world.” A review of the record reveals that defense counsel’s closing statement contained comments that justify the prosecutor’s response. Before the prosecutor’s statement, defense counsel stated in closing argument that “we are living unfortunately in one of the most dangerous cities in the world” and that none of the

jurors would go to someone's house at 3:00 a.m. and ask to speak to the owner's spouse. In light of defense counsel's remarks, we find that the prosecutor's statement in rebuttal did not unduly prejudice defendant. Defendant was not denied the effective assistance of counsel because his attorney failed to object to the prosecutor's remarks.

Defendant also argues that he was denied the effective assistance of counsel at sentencing because his attorney failed to object to the trial court's upward departure from the sentencing guidelines. However, we have found that the trial court did not abuse its discretion in departing from the guidelines, *Babcock*, 469 Mich at 258, and therefore defense counsel's failure to object to the sentence did not prejudice defendant. Defense counsel was not ineffective for failing to make futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Finally, defendant also claims that he was denied the effective assistance of counsel because his attorney stood mute during sentencing and did not do any independent investigation. Defendant's statement that his attorney stood mute during sentencing is not accurate. Defense counsel argued mitigating circumstances to the court. Furthermore, defendant does not explain what defense counsel would have discovered if an independent investigation would have been done and how that would have benefited him. Therefore, the issue is not properly presented on appeal and is deemed waived. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Further, even if counsel erred, there was no prejudice. The evidence was very strong in favor of defendant's conviction, and the trial court did not abuse its discretion when it sentenced defendant outside the sentencing guidelines. Therefore, defendant was not denied the effective assistance of counsel on this basis.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens